



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 10-00454
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: *Pro se*

October 5, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance to work in the defense industry. Applicant's history of marijuana use during 2001–2009, along with an equivocal intent to discontinue such use, raises questions about his ability or willingness to comply with laws, rules, and regulations. Applicant did not present sufficient evidence of reform or changed circumstances to mitigate the security concerns raised by his drug abuse. Accordingly, as explained below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on May 17, 2010, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guideline known as Guideline H for drug involvement. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR in a timely fashion. Neither Applicant nor Department Counsel requested a hearing, and so, the case will be decided on the written record.²

On or about June 28, 2010, the Agency submitted its written case consisting of all relevant and material information that could be adduced at a hearing.³ This so-called file of relevant material (FORM) was mailed to Applicant and received by him on July 7, 2010. He then had a 30-day period to submit a response setting forth objections, rebuttal, extenuation, mitigation, or explanation. He did not reply. The case was assigned to me September 21, 2010.

Findings of Fact

Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 27-year-old auditor employed by a financial-services firm. He earned a bachelor's degree in May 2006, and began working for the financial-services firm later that same year. He is not married and has no children.

Applicant completed a security clearance application in September 2009;⁴ it appears this is the first time he has applied for a security clearance. In answering

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Directive, Enclosure 3, ¶ E3.1.7.

³ The file of relevant material consists of Department Counsel's written brief and supporting documents, some of which are identified as exhibits in this decision.

⁴ Exhibit 5.

Question 23a of the application, he disclosed using illegal drugs within the last seven years. He reported using marijuana during August 2001 to August 2009. He described his marijuana usage as recreational use during college and his initial years of employment. He indicated that smoked marijuana about 30 to 40 times, and that he had used it about four times since June 2008.

About a month later in October 2009, Applicant participated in an official interview in which he stated the following about his use of marijuana:⁵

1. He admitted using marijuana from August 2001 through August 2009 about 30 to 40 times.
2. He used marijuana in a water bong or joint form.
3. He denied using marijuana while school was in session, but used it during the summers at a frequency of one to two times weekly.
4. He bought marijuana from friends (names not recalled).
5. He has not sold, manufactured, or distributed marijuana.
6. He stopped using marijuana on his own, and he has never been diagnosed as an abuser of or addicted to marijuana.
7. He may use marijuana again, but he is not actively pursuing it.

Applicant did not submit any documentary information in response to the FORM. Likewise, the record is silent concerning Applicant's good employment record or constructive community involvement.

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.⁶ As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁷ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

⁵ Exhibit 6.

⁶ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

⁷ 484 U.S. at 531.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁸ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.⁹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁰ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹³ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁴ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁵

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.¹⁶ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

⁸ Directive, ¶ 3.2.

⁹ Directive, ¶ 3.2.

¹⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹¹ Directive, Enclosure 3, ¶ E3.1.14.

¹² Directive, Enclosure 3, ¶ E3.1.15.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ *Egan*, 484 U.S. at 531.

¹⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁶ Executive Order 10865, § 7.

Analysis

Under Guideline H for drug involvement,¹⁷ the suitability of an applicant may be questioned or put into doubt when an applicant has a history of drug abuse or other illegal drug involvement. The overall concern under Guideline H is that:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.¹⁸

Drug abuse means "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."¹⁹

Applicant's history of marijuana use raises obvious security concerns. He engaged in drug abuse by using marijuana over a period of years, to include the initial years of his employment with the financial-services firm. His most recent marijuana use occurred in August 2009, about one month before he completed the security clearance application. He has stated that he may use marijuana again, but he is not actively pursuing it. Taken together, these circumstances raise concerns under two disqualifying conditions.²⁰

The guideline also provides that certain conditions may mitigate security concerns.²¹ I considered all the mitigating conditions and conclude none apply. Although his last use of marijuana took place more than one year ago, his future intentions are equivocal, as he has stated that he may use marijuana again. Given his equivocation, Applicant failed to demonstrate a clear intention not to use marijuana in the future. In short, the evidence of reform or changed circumstances at this point is insufficient to mitigate the security concerns.

To conclude, Applicant's history of marijuana use during 2001–2009, with an equivocal intent to discontinue such use, raises questions about his ability or willingness to comply with laws, rules, and regulations. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I gave due consideration to the whole-person concept²² and Applicant's

¹⁷ AG ¶¶ 24, 25, and 26 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁸ AG ¶ 24.

¹⁹ AG ¶ 24(b).

²⁰ AG ¶¶ 25(a) and (h).

²¹ AG ¶ 26(a) – (d).

²² AG ¶ 2(a)(1) – (9).

favorable evidence. Nevertheless, Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a–1.c:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge